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No. 83-2099

IN THE

Supreme Court of the United States

October Term, 1984

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

THE COMMISSIONER OF REVENUE OF
THE STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Minnesota Supreme Court, affirming the Minnesota Tax Court's finding that Associated Dry Goods Corporation is a unitary business carried on within and without the State of Minnesota, was based upon correct constitutional standards and was within the realm of permissible judgment.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commissioner of Revenue for the State of Minnesota, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 347 N.W.2d 36 (Minn., 1984).

STATEMENT OF THE CASE

This is a Minnesota corporate income tax case involving the question of whether Associated Dry Goods Corporation (hereinafter "Associated") was carrying on a unitary business within and without Minnesota, so that its income was apportionable according to Minnesota's three-factor formula.[1] The facts of this case were extensively developed through pretrial discovery and at a four-day trial held before the three-judge Minnesota Tax Court, sitting *en banc*. After trial the Tax Court unanimously adopted detailed Findings of Fact which are reprinted in the appendix to the petition herein. (A. 12a-26a).[2]

Those Findings show that Associated is a Virginia corporation with its principal office and corporate headquarters in New York City, and which carries on its retail merchandising business in a number of states through corporate divisions rather than subsidiary corporations. (Findings No. 1 and 3). Associated is qualified to do business in Minnesota, where it owns and operates several retail stores through its Powers Dry Goods division. (Finding No. 4). Associated is a single corporation, with a single board of directors and a single

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[1] This is the second time Associated has attempted to bring the same issue up on petition for writ of certiorari. In *Associated Dry Goods Corporation v. Commissioner of Taxation of Minnesota*, 306 Minn. 532, 235 N.W.2d 821 (1975), *cert. denied* 425 U.S. 999 (1976), it was determined that Associated was carrying on such a unitary business during the taxable years immediately preceding those at issue in this case.

[2] Throughout this brief the abbreviation "A.—" is a reference to the Appendix filed with the Petition. The abbreviation "Finding No. —" is a reference to the Minnesota Tax Court's Findings of Fact.

group of corporate officers who are responsible to its shareholders for the management of the business. (Finding No. 2).

While day-to-day management of each division is decentralized to a division president and a division treasurer, these positions are filled by the board of directors (Finding No. 12), and all division presidents report to the corporate officers in New York who are charged with their supervision. (Finding No. 13). In addition, some division presidents hold the title "regional executive vice-president" and have responsibility over other divisions (*Id.*); while other division presidents are often called to do work of a corporate-wide nature. (Finding No. 16).

Associated holds regular meetings between its corporate and divisional officers to discuss and resolve common problems, including two presidents' meetings each year, an annual treasurers' meeting, and an annual personnel managers' meeting. (Findings No. 22-25). Associated frequently utilizes its key personnel on a corporate-wide basis by offering them transfer promotions from one division to another, and from divisional to corporate positions. (Finding No. 17).

The store divisions are required to submit regular reports to the corporate office in New York on a daily, weekly, monthly, quarterly, seasonal and annual basis. (Finding No. 26). Many of these reports are compiled together on a comparative basis and then distributed back to the divisions for use as tools in planning more efficient day-to-day operations. (Findings No. 27 and 28). In addition, Associated's board of directors regularly reviews these divisional reports and also approves all divisional capital budgets, seasonal budgets, expansion plans, and contributions budgets. (Findings No. 11, 45 and 50).

The corporate treasurer in New York has total responsibility for Associated's accounting and financial matters, in-

cluding the making of loans, advancing funds to the divisions and withdrawing funds from the divisions. (Finding No. 18). All capital for store expansion comes from the retained earnings of the corporation as a whole, or from other corporate-wide financing. (Finding No. 45). Preparation of all the corporation's state and federal income tax returns is done at New York under the supervision of the corporation's tax manager. (Findings No. 18 and 56).

In the functional area of buying inventory Associated's divisional buyers are formed into corporate-wide buying committees under the direction and control of the corporation's Market Research Division. (Findings No. 36, 37 and 42). Thus, while local buyers make their own buying decisions (Finding No. 35), the corporate committees and Market Research Division provide valuable assistance to them in comparing and exchanging information, surveying the markets and engaging in mutually beneficial group purchases of common items of merchandise. (Findings No. 36 and 37). Associated also has a London based, wholly-owned subsidiary, Associated Dry Goods (U.K.) Ltd., to conduct a foreign market research operation very similar to Associated's Market Research Division in New York. (Findings No. 39 and 40).

Associated buys all its insurance on a centralized basis through the corporate headquarters. (Finding No. 49). It also maintains a common pension plan for all divisions (Finding No. 53), a corporate-wide employee discount policy (Finding No. 54), and a mandatory retirement age policy (Finding No. 55).

Finally, the Minnesota Tax Court found that Associated's store divisions are financially interdependent in the sense that all divisions contribute to Associated's earnings, and each division's surplus earnings are sent to the corporate office

where they are commingled with other corporate funds, out of which Associated then transfers funds back to the divisions on an as needed basis for day-to-day operations. (Finding No. 31). In 1969, Associated created a wholly owned finance subsidiary, Associated Dry Goods Credit Corporation, to ease the financing of corporate operations through the purchase of accounts receivable from the store divisions. (Finding No. 52). The Credit Corporation uses these as security in borrowing funds, which are then loaned back to Associated for use in financing both its capital projects and its day-to-day division operations. (*Id.*).

For the taxable years at issue herein (1967-1975) Associated filed its Minnesota corporate income tax returns on a separate accounting basis. The respondent Commissioner determined that the three-factor formula should have been used, and on May 17, 1977, issued an order assessing additional tax and interest against Associated in a total amount of $280,085.06. Associated appealed and trial was held before the Minnesota Tax Court on October 7-12, 1981. After briefs were filed the Tax Court issued its unanimous Order, dated November 2, 1982, affirming the Commissioner's Order. Associated took a further appeal to the Minnesota Supreme Court, which affirmed the Tax Court's decision on March 23, 1984.

REASONS FOR DENYING THE WRIT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE THE MINNESOTA SUPREME COURT APPLIED SETTLED LEGAL STANDARDS AND WHERE, UNDER THE FACTS, ITS DECISION WAS CLEARLY WITHIN THE REALM OF PERMISSIBLE JUDGMENT.

Over the past four years this Court has issued no less than five opinions on the subject of the unitary business principle in state taxation of multi-jurisdictional corporations. In the most recent of these, *Container Corporation of America v. Franchise Tax Board*, —— U.S. ——, 103 S.Ct. 2933 (1983), this Court concluded that: "The legal principles defining the constitutional limits on the unitary business principle are now well established." *Id.*, 103 S.Ct. at 2946. But while the legal standards are thus well settled, the factual background of each case has been, and will continue to be, as varied and different as the American economy itself. Factual situations can range from the sparsity of facts in *F.W. Woolworth Co. v. Taxation and Revenue Department*, 458 U.S. 354 (1982), where it was noted that "the State did a very poor job of inquiring into and developing the facts," *Id.* at 360; to the more or less comprehensive stipulations of fact entered into in such cases as *Container Corp., supra*, and *Butler Bros. v. McColgan*, 315 U.S. 501 (1942).

Because of these factual variations, and also no doubt because of the long established principle that this Court will not review decisions of state courts upon questions of fact that are supported by substantial evidence,[3] this Court has recognized

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[3] *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442 (1964); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 357-358 (1925); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 164 (1918).

that in this particular area of jurisprudence "not every claim that a state court erred in making a unitary business finding will pose a substantial federal question." *Container Corp.*, 103 S.Ct. at 2946, n. 14.

This is exactly the situation we have in the present petition, as the foregoing Statement of the Case clearly indicates.

In *Container Corp.*, this Court established a standard of review for future cases, saying that:

> It will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of those principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of criminal comment. *Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment."*

103 S.Ct. at 2946. (Emphasis added).

The decision below more than adequately meets this standard of review. The Minnesota Supreme Court expressly reviewed and adopted the legal principles established by this Court. For example, it said in its opinion that:

> [A] multistate enterprise may be characterized as a unitary business where there are "contributions to income resulting from functional integration, centralization of management, and economies of scale." *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 438 (1980).

347 N.W.2d at 39. (A. 5a).

The Minnesota Supreme Court then correctly applied those principles to the facts of this case, when it wrote, *inter alia*, that in Associated's case:

> [T]here is evidence of centralization of management: there is one set of stockholders, officers and directors to perform the kind of executive oversight that goes beyond "potential" to some degree of "implicit" control. *Container Corp.*, 103 S.Ct. at 2946-47 n. 16. There is also evidence of functional integration: for example, the sharing of information, some group buying, periodic reports and conferences, preparation of tax returns at the corporate level, centralized purchasing of casualty insurance, one pension plan, and various consultant services. Finally, there is evidence of economies of scale: funds are commingled and used to fund capital improvements and for loans back to the divisions; accounts receivable are purchased from the division by a New York subsidiary.

347 N.W.2d at 42. (A. 9a-10a).

Clearly, these factually based conclusions are well "within the realm of permissible judgment." *See* the statement of unitary factors listed by this Court in *Container Corp., supra*, 103 S.Ct. at 2947-2948.

In its petition for writ of certiorari Associated makes no serious claim that the factual findings of the courts below are inaccurate. Indeed, Associated implicitly concedes that they are supported by substantial evidence. Pet. for Writ, p. 12.[4] Nor do we understand Associated to be arguing that the Minnesota Court adopted the wrong legal principles. Instead, Associated argues that its case is "on all fours" with the facts

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[4]The abbreviation "Pet. for Writ ——" refers to Associated's Petition for Writ of Certiorari.

in *F.W. Woolworth, supra,* (*see* Pet. for Writ, p. 5), and that the judgment of the Minnesota Supreme Court is somehow wrong for disagreeing with them on this point. Pet. for Writ, p. 11.

In fact, *F.W. Woolworth,* is readily distinguishable from the case at hand, as we point out in Part II of this brief, *infra.* But more importantly, it must be remembered that the *F.W. Woolworth* case broke no new ground in formulating the unitary business principle. This Court did not, as Associated seems to suggest, create some new exception from the unitary principle for retail merchandisers. Instead, this Court simply applied recognized law to the unique record in that case.

The leading case in this area remains *Butler Bros. v. McColgan,* 315 U.S. 501 (1942). In that case, the taxpayer was also a single corporation operating distributing houses as separate divisions in several different states. Like Associated, each distributing house was to a great extent operated independently of the others, but there was centralized purchasing of goods through a central buying division. This fact alone was held to be sufficient ground for treating the taxpayer as a unitary business. 315 U.S. at 508.

Inasmuch as Associated's group buying, organized and coordinated as it is through corporate-wide buying committees and the New York-based Market Research Division (Findings No. 36-37 and 41-42), is substantially no different from the central buying in *Butler Bros., supra,* it is therefore clear that Associated is also a unitary business. When this fact is combined with the numerous other facts pointing to the unitary nature of Associated's business, as outlined in our Statement of the Case, *supra,* it becomes obvious that there simply is no substantial federal issue presented in this case. Instead, the *Butler Bros.* decision continues to provide a clear statement of the applicable law.

II. THE DECISION OF THE MINNESOTA SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN THE *F.W. WOOLWORTH* CASE, BECAUSE THE TWO CASES ARE DISTINGUISHABLE.

In its petition Associated relies chiefly upon alleged comparisons with the situation in *F.W. Woolworth Co. v. Taxation and Revenue Dept.*, 458 U.S. 354 (1982); but that case is readily distinguishable from the case at hand.

In contrast to the extensive record developed by the State of Minnesota regarding Associated's numerous unitary aspects, it was observed in *F.W. Woolworth* by both the state court and the United States Supreme Court that the State of New Mexico "[r]egrettably, . . . did a very poor job of inquiring into and developing the facts." 458 U.S. at 360, citing the New Mexico Supreme Court in 95 N.M. at 524, 624 P.2d at 33. Because of this paucity of evidence, it is not surprising that this Court failed to find the three factors of profitability necessary for a unitary business (i.e. functional integration, centralization of management and economies of scale) in *Woolworth's* relations with its overseas subsidiaries.

In the present case, there is no such problem.

The evidence of functional integration by Associated is extensive and far greater than in the *Woolworth* case. Unlike the totally decentralized buying policies of *Woolworth*, 458 U.S. at 365, Associated maintains a Market Research Division for the express purpose of coordinating and organizing store buyers into corporate-wide buying committees for mutually beneficial information exchanges and group purchasing. (Findings No. 36-37 and 41-42). The foreign buying by Associated's divisions was done on a similarly cooperative and group buying basis. (Findings No. 39-40).

In *F.W.Woolworth*, "each subsidiary was responsible for obtaining its own financing from sources other than the parent." 458 U.S. at 367. In contrast, Associated's individual divisions are completely dependent upon the corporate headquarters for financing not only capital projects, but also for day-to-day operations. (Findings No. 31, 32 and 52). All this is coordinated and supervised by Associated's corporate treasurer in New York. (Finding No. 18).

Other examples of functional integration present in this case, but not in *F.W. Woolworth*, are the centralized purchasing, at reduced group rates, of insurance (Finding No. 49); the use by some store divisions of regional computer banks located at other store divisions (A. 8a); and the corporate approval, financing and aid in the building of new divisional stores (Findings No. 45-46).

In centralization of management, Associated's board and officers took an active role in the actual management of many aspects of its divisions' business. (Findings No. 10, 11, 13 and 29). This contrasts with *F.W. Woolworth*, where it was found that the parent had "no department or section, as such, devoted to overseeing the foreign subsidiary operations." 458 U.S. at 367. Also unlike *F.W. Woolworth*, where "[t]here was no 'policy of the parent that all of the managers of all the operations get together periodically to discuss the overall *Woolworth* operations'," 458 U.S. at 368, Associated has an established policy of regularly holding two divisional presidents' meetings each year, as well as annual treasurers' and personnel managers' meetings. (Findings No. 22-25).

Associated's centralized management control is exercised through an extensive system of daily, weekly, monthly, quarterly, seasonal and annual reports, plus semiannual sales plans (Findings No. 10 and 26), as well as transfers of key person-

nel between divisions and promotions to corporate positions (Findings No. 7 and 17). This contrasts sharply with *Woolworth*, which exercised only "the type of occasional oversight . . . that any parent gives to an investment in a subsidiary." 458 U.S. at 369. Also unlike *Woolworth*, 458 U.S. at 368, Associated has a corporate tax manager who prepares in New York all of its state and federal tax returns. (Finding No. 56).

This is by no means an exhaustive list of the differences between the two cases. But it serves to illustrate that, on the basis of factual evidence alone, there is a great deal of difference between *F.W. Woolworth* and the case at hand. While there was little, if any, evidence of "functional integration, centralization of management and economies of scale" in *F.W. Woolworth*, all three factors have been found to exist in the case at hand.

III. PETITIONER'S CONTENTION THAT MINNESOTA IGNORES CONSTITUTIONAL STANDARDS IN A SEARCH FOR GREATER REVENUE IS TOTALLY UNFOUNDED.

The second part of Associated's petition (pp. 12-15) is devoted to the old complaint that states really do not care which method of taxation (formulary apportionment or separate accounting) is used just so long as it garners the most revenue. In the first place, this is a strange argument coming from a corporation which itself chooses to file income tax returns in some states on a unitary apportionment basis and in other states on a separate accounting basis. (Finding No. 57). As the Minnesota Tax Court aptly mentioned in its order: "It seems unfair for a corporation doing business in a number of states to pick and choose different methods of accounting

in different states to obtain the most favorable tax treatment in each state." (A. 33a).

Secondly, whatever may be the practice in some states, Minnesota clearly does not engage in the practice of switching back and forth between tax accounting methods. In fact, in the instant case the additional tax assessed by Minnesota was for only six of the nine years in issue. For three of the years in issue (1970, 1971 and 1973) the application of the unitary three-factor formula by the Commissioner actually resulted in a reduction in the tax originally reported by Associated on its returns. (Finding No. 58).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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